Segar Oil Palm Estate Sdn Bhd v Tay Tho Bok & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J–02–508 1996

SHAIK DAUD, SITI NORMA YAAKOB AND MAHADEV SHANKAR JJCA

29 MAY 1997

Contract *— Rectification — Sale and purchase of land — Allegation of fraudulent misrepresentation — Fraud did not relate to identity of subject matter of the contract but only to a part of its character — Whether court could order rectification of the agreement — Specific Relief Act 1950 s 30*

Contract *— Rescission — Partial rescission — Whether attempted partial rescission of an indivisible contract amounted to a total repudiation of the contract — Contracts Act 1950 s 56(1)*

Contract *— Deposit — Recovery of — Repudiation and termination of contract brought by misrepresentation of vendors — Application of doctrine of unjust enrichment — Whether vendors should be allowed to retain the deposit in the face of the finding of fraud*

The appellants ('the vendors') were the registered proprietors of 65.325 acres of land ('the land'). Several water pipelines and high tension cables ('the fixtures') tranversed the land ('the reserved land') and took up 17.68 acres of the land.

On 16 May 1988, the respondents ('the purchaser') entered into a sale and purchase agreement ('the agreement') with the vendors to buy the land and paid a deposit. The agreement provided that the balance of the purchase price ('the contractual purchase price') had to be paid on or before 16 August 1988. The purchasers alleged they were fraudulently misrepresented by the vendors and their agents at the time of the signing of the agreement that the fixtures were outside the land. Upon knowledge that the alleged representation was untrue, the purchasers, in their letter to the vendors, took the view that they should only pay a price representing the value of 47.645 acres ('the reduced purchase price') since the reserved land was being used by third parties. The vendors replied on 9 August 1988 insisting that the land area to be transferred was 65.325 acres and that if the purchasers did not complete on 16 August as provided by the agreement, the vendors would exercise their rights under the agreement and forfeit the deposit. On 16 August 1988, the purchasers' solicitors tendered a cheque for the reduced purchase price and demanded that the vendors transfer the land. The vendors refused. The cheque was returned the following day but the deposit was forfeited. On 22 October 1988, the purchasers' solicitors unconditionally tendered the full balance of the contractual purchase price and demanded that the land be transferred to them. The vendors again refused.

The purchasers claimed for the rectification of the agreement (under s 30 of the Specific Relief Act 1950) to reflect the reduced

purchase price in order to express the real intention of the parties. The purchasers further claimed for a decree of specific performance of the rectified contract and damages. However, no special damage was alleged to have been suffered by the purchasers. A

The learned judge found as a fact that the vendors had misrepresented the true location of the fixtures. He further found that this misrepresentation was made fraudulently in that its objective was to induce the purchasers to enter into the agreement on the basis that the fixtures were outside the land. However, the learned judge declined to order rectification but instead ordered that the agreement be performed by the payment of the full balance of the purchase price within one month from the date of the order. He further ordered the vendors to give the purchasers registrable transfers to the titles within one month from the date of the order. And he ordered that damages be assessed on a date to be fixed by the deputy registrar. The vendors appealed. B C

Counsel for the purchasers submitted that the purchasers' avoidance of that part of the contract which could not be performed was in accordance with s 56(1) of the Contracts Act 1950. He argued that the reserved land should be regarded as land to which the vendors could not make good title and should therefore be taken out of the contract. D E

Held, allowing the appeal:

(1) It would be erroneous to suppose that, in the circumstances of this case, s 30 of the Specific Relief Act 1950 had any application. A contract may only be rectified to express the intention of *both* parties to the agreement. Illustration (a) to s 30 sets out the appropriate parallel. Here, the contract was for the transfer of the titles containing 65.325 acres. Both parties intended to buy the land. The purchasers' claim for rectification was that they should only buy and/or pay for 47.645 acres. In other words, 17.68 acres should be taken out of the agreement. However, the vendors never intended to sell only 47.645 acres. Nor for that matter did the purchasers intend originally to buy 47.645 acres. The fraud in this case did not relate to the identity of the subject matter of the contract, but only to a part of its character. The reliance on s 30 of the Specific Relief Act 1950 was therefore wholly misplaced (see pp 219I and 220A–B). F G H

(2) The attempt at partial rescission was also misconceived. In this case, the attempted partial rescission on completion day amounted to a total repudiation of the contract. It was therefore quite wrong to extend time as the learned judge did and order specific performance. I

The words, '... the contract, *or so much of it as has not been performed* ...' in s 56(1) of the Contracts Act 1950 refers to the contract to transfer the whole of the 65.325 acres of the land. In

A the result, if the purchasers were purporting to act under this section, they had to avoid the whole of the contract.

Therefore, it was a fallacy that the purchasers were legally entitled to a partial rescission of an indivisible contract. What was totally overlooked was that if the contract was to be performed
B at all, it must result in the transfer of the whole 65.325 acres (see pp 220I, 221I and 222D); *Stickney v Keeble* [1915] AC 386 followed; *Topfell Ltd v Galley Properties Ltd* [1979] 2 All ER 388 and *Yap Hong Too & Anor v Wong Ah Mei & Anor* [1977] 1 MLJ 545 distinguished.

C (3) The purchasers' repudiation was accepted by the vendors when they terminated the contract on 16 August 1988. This situation was brought about by the misrepresentation of the vendors. For the vendors to retain the deposit in the face of the finding of fraud would be an unjust enrichment which could not be permitted. In accordance with the purchasers' alternative prayer,
D the deposit was ordered to be refunded with interest at 8%pa from date of filing of writ up to realization.

No separate award for damages was made because none was pleaded or proven in the court below. Rescission and damages for deceit for fraudulent misrepresentation may be cumulative
E remedies but recovery under either head requires proper pleadings and proof. The purchasers' counsel closed his case without providing either and it would not be right to reopen the issue of damages to be assessed as was done here (see pp 222I and 223A–B).

F **[Bahasa Malaysia summary**

Perayu-perayu ('penjual') adalah pemilik berdaftar 65.325 ekar tanah ('tanah tersebut'). Beberapa talian paip air dan kabel tegangan tinggi ('lekapan tersebut') merintangi tanah tersebut ('tanah rizab tersebut') dan mengambil 17.68 ekar tanah tersebut.

G Pada 16 Mei 1988, penentang-penentang ('pembeli') mengikat suatu perjanjian jual beli ('perjanjian tersebut') dengan penjual untuk membeli tanah tersebut dan membayar deposit. Perjanjian tersebut memperuntukkan bahawa baki harga beli ('harga beli kontraktual') hendaklah dibayar pada atau sebelum 16 Ogos 1988. Pembeli
H mendakwa bahawa mereka telah disalah nyata secara fraud oleh penjual dan ejen mereka pada masa menandatangani perjanjian tersebut bahawa lekapan tersebut berada di luar tanah tersebut. Apabila mengetahui bahawa representasi yang dikatakan itu adalah tidak benar, pembeli, dalam surat mereka kepada penjual, berpendapat bahawa mereka hanya perlu membayar harga yang mewakili nilai
I 47.645 ekar ('harga beli yang dikurangkan') kerana tanah rizab tersebut sedang digunakan oleh pihak ketiga. Penjual menjawab pada 9 Ogos 1988 menegaskan bahawa kawasan tanah yang akan dipindahmilik adalah 65.325 ekar dan bahawa jika pembeli tidak menyempurnakan pada 16 Ogos seperti yang diperuntukkan oleh

perjanjian tersebut, penjual akan melaksanakan hak mereka di bawah perjanjian tersebut dan melucuthak deposit itu. Pada 16 Ogos 1988, peguamcara pembeli menyerahkan cek bagi harga beli yang dikurangkan dan menuntut bahawa penjual memindahmilik tanah tersebut. Penjual menolak. Cek tersebut dikembalikan pada hari berikutnya tetapi deposit itu dilucuthak. Pada 22 Oktober 1988, peguamcara pembeli menyerahkan tanpa syarat baki penuh harga beli kontraktual dan menuntut bahawa tanah tersebut dipindahmilik kepada mereka. Penjual sekali lagi menolak. A B

Pembeli menuntut pembetulan perjanjian tersebut (di bawah s 30 Akta Relief Spesifik 1950) untuk memasukkan harga beli yang dikurangkan demi untuk menyatakan niat sebenar pihak-pihak. Pembeli selanjutnya menuntut dekri pelaksanaan spesifik kontrak yang dibetulkan dan ganti rugi. Bagaimana pun, tiada ganti rugi khas dikatakan telah dialami oleh pembeli. C

Hakim yang bijaksana mendapati sebagai suatu fakta bahawa penjual telah menyalah nyata lokasi sebenar lekapan tersebut. Beliau selanjutnya mendapati bahawa salah nyata ini dibuat secara fraud dalam mana objektifnya adalah untuk mendorong pembeli untuk mengikat perjanjian atas dasar bahawa lekapan tersebut berada di luar tanah tersebut. Bagaimana pun, hakim yang bijaksana menolak untuk memerintahkan pembetulan tetapi sebaliknya memerintahkan bahawa perjanjian tersebut dilaksanakan dengan pembayaran penuh baki harga beli dalam masa sebulan dari tarikh perintah tersebut. Dan beliau memerintahkan bahawa ganti rugi ditaksirkan pada suatu tarikh yang akan ditetapkan oleh timbalan pendaftar. Penjual membuat rayuan. D E

Peguam bagi pihak pembeli menghujahkan bahawa pengelakan pembeli daripada bahagian kontrak itu yang tidak boleh dilaksanakan adalah selaras dengan s 56(1) Akta Kontrak 1950. Beliau menghujahkan bahawa tanah rizab tersebut sepatutnya dianggap sebagai tanah yang mana penjual tidak mempunyai hakmilik yang baik dan oleh itu patut dikeluarkan daripada kontrak itu. F G

Diputuskan, membenarkan rayuan:

(1) Adalah salah untuk menganggap bahawa, dalam keadaan kes ini, s 30 Akta Relief Spesifik 1950 adalah terpakai. Sesuatu kontrak hanya boleh dibetulkan untuk menjelaskan niat *kedua-dua* pihak kepada perjanjian tersebut. Penjelasan (a) kepada s 30 menyatakan persamaan yang sesuai. Di sini, kontrak adalah untuk pemindahan hakmilik yang mengandungi 65.325 ekar. Kedua-dua pihak berniat untuk membeli tanah tersebut. Tuntutan pembeli untuk pembetulan adalah bahawa mereka sepatutnya membeli dan/ atau membayar untuk 47.645 ekar. Dengan lain perkataan, 17.68 ekar patut dikeluarkan daripada perjanjian tersebut. Bagaimana pun, penjual tidak pernah berniat untuk menjual hanya 47.645 ekar. Begitu juga pembeli tidak berniat pada asalnya untuk membeli 47.645 ekar. Fraud dalam kes ini tidak ada H I

kaitan dengan identiti perkara subjek kontrak, tetapi hanya kepada sebahagian sifatnya. Oleh itu, penggunaan s 30 Akta Relief Spesifik 1950 adalah sama sekali tidak kena pada tempatnya (lihat ms 219I dan 220A–B).

(2) Cubaan untuk pembatalan sebahagian adalah juga satu tanggapan salah. Dalam kes ini, cubaan untuk pembatalan sebahagian pada hari penyempurnaan sama seperti penolakan sepenuhnya kontrak tersebut. Oleh itu adalah agak salah untuk melanjutkan masa seperti yang dilakukan oleh hakim yang bijaksana dan memerintahkan pelaksanaan spesifik.

Perkataan-perkataan, '... kontrak itu, *atau sebanyak mana daripadanya yang belum dilaksanakan* ...' dalam s 56(1) Akta Kontrak 1950 merujuk kepada kontrak untuk memindahmilik keseluruhan 65.325 ekar tanah tersebut. Oleh yang demikian, sekiranya pembeli bertujuan untuk bertindak di bawah seksyen ini, mereka perlu mengelak daripada keseluruhan kontrak itu.

Oleh itu, adalah suatu falasi bahawa pembeli adalah berhak di sisi undang-undang kepada pembatalan sebahagian daripada kontrak yang tidak boleh dibahagikan itu. Apa yang tidak diambil kira langsung adalah bahawa jika kontrak itu hendak dilaksanakan, ianya mesti berakhir dengan pemindahan keseluruhan 65.325 ekar (lihat ms 220I, 221I dan 222D); *Stickney v Keeble* [1915] AC 386 diikut; *Topfell Ltd v Galley Properties Ltd* [1979] 2 All ER 388 dan *Yap Hong Too & Anor v Wong Ah Mei & Anor* [1977] 1 MLJ 545 dibeza.

(3) Penolakan pembeli telah diterima oleh penjual apabila mereka menamatkan kontrak itu pada 16 Ogos 1988. Situasi ini timbul oleh kerana salah nyata penjual. Berhadapan dengan penemuan fraud, adalah suatu pengayaan tidak adil jika penjual menyimpan deposit itu dan ini tidak boleh dibenarkan. Selaras dengan tuntutan alternatif pembeli, deposit diperintahkan dikembalikan dengan faedah 8% setahun daripada tarikh pemfailan writ sehingga realisasi.

Tiada award berasingan untuk ganti rugi dibuat kerana tidak satu pun diplid atau dibuktikan di mahkamah bawah. Pembatalan dan ganti rugi untuk penipuan bagi salah nyata fraud mungkin merupakan remedi kumulatif tetapi mendapat kembali di bawah mana-mana tajuk memerlukan pliding dan bukti yang wajar. Peguam pembeli menutup kesnya tanpa memperuntukkan yang mana satu dan adalah tidak betul untuk membuka kembali isu ganti rugi untuk ditaksirkan seperti yang dilakukan di sini (lihat ms 222I dan 223A–B).]

Notes

For cases on rectification, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2009–2011.

For cases on rescission, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2017–2047.

For cases on deposit, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1496–1506.

Cases referred to

Stickney v Keeble [1915] AC 386 (folld)
Topfell Ltd v Galley Properties Ltd [1979] 2 All ER 388 (distd)
Yap Hong Too & Anor v Wong Ah Mei & Anor [1977] 1 MLJ 545 (distd)

Legislation referred to

Contracts Act 1950 s 56(1)
Specific Relief Act 1950 ss 30, 32

Appeal form: Civil Suit No 22–417 of 1988 (High Court, Johor Bahru)

Pushpa Menon and *A Nawamani* (*TS Chong & Co*) for the appellants.
M Pathmanathan, Gan Techiong and *Shanti Pathmanathan* (*Gan & Lim*) for the respondent.
Gan Huey Piin (*Gulam & Wong*) watching brief for the Public Utilities Board, Singapore.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): The appellants ('the vendors') were the registered proprietors of 65.325 acres of land ('the land') comprised in 11 separate titles, all in the Mukim of Kota Tinggi, Johor. On 16 May 1988, the respondents ('the purchasers') entered into a sale and purchase agreement ('the agreement') with the vendors to buy the land. The price agreed was RM7,000 per acre. The total purchase price was RM457,275. As agreed, the purchasers paid a 10% deposit amounting to RM45,727.50. The completion date was fixed for 16 August 1988. Clause 16 of the agreement provided that time was to be of the essence of the agreement. Therefore, the balance purchase price of RM411,547.50 had to be paid on or before 16 August 1988.

Before the purchasers executed the agreement, they were taken to see the land by two persons said to be the vendors' agents. A pipeline reserve to facilitate the passage of three very large water pipes belonging to the Public Utilities Board Singapore ('the PUB') traversed seven out of the eleven titles. These pipes carried water from Kota Tinggi reservoirs to Singapore. Alongside this reserve but affecting all 11 titles was a transmission cable reserve of the Tenaga Nasional Bhd ('the TNB') (formerly the Lembaga Letrik Negara ('the LLN')). This reserve was utilized for high tension cables and the pylons ('the fixtures') used to carry them. Both the water pipes and the fixtures were so visible that it was impossible for anybody in the vicinity not to notice them.

However, at the time of the visit, the vendors' agents are said to have actively represented to the purchasers that the fixtures were in fact outside the land. At or about the time the agreement was executed, this

A representation was repeated by the vendors' agents in the presence of the parties and the vendors did not do anything to correct the representation.

The titles to the 11 lots comprising the land did not show any memorial registered thereon relating to these reserves.

The purchasers only took steps to check out the location of the B fixtures after they executed the agreement. Their surveyor advised them that contrary to the representation, the reserves and the fixtures thereon did in fact traverse the land. The pipeline reserves took up 4.08 acres. The TNB's reserve took up a further 13.60 acres, making 17.68 acres in all.

The purchasers therefore took the view that they should only pay a C price representing the value of 47.645 acres, since in their view, the 17.68 acres were being used by the PUB and the TNB. On 4 August 1988, the purchasers' solicitors wrote to the vendors' solicitors that the actual area of the land was less than 65.325 acres and requested that the completion date be postponed until a meeting had been held to resolve the discrepancy. The vendors replied on 9 August 1988 insisting that the land area to be D transferred was 65.325 acres and that if the purchasers did not complete on 16 August as provided by the agreement, the vendors would exercise their rights under cl 10 of the agreement and forfeit the deposit.

On 13 August 1988, the purchasers' solicitors replied insisting that the purchasers were only prepared to pay for 47.645 acres which works out E to RM333,515. After deducting the deposit of 10%, they contended that completion should take place on the payment of the nett balance of RM287,787.50. The vendors' solicitors did not respond.

On 16 August 1988, the purchasers' solicitors tendered a cheque for RM287,787.50 and demanded that the vendors transfer the 11 titles. The F vendors refused. The cheque was returned the following day but the 10% deposit was forfeited.

Nothing happened after this until 22 October 1988 when the purchasers' solicitors unconditionally tendered the full balance of the contractual purchase price of RM411,547.50 and demanded that the land G be transferred to them. The vendors refused.

After another delay of more than two months, the purchasers filed this writ on 28 December 1988.

The facts hereinbefore set out were pleaded in the amended statement of claim and buttressed by an allegation that the vendors by their servants H or agents had dishonestly concealed from the purchasers before the agreement was executed that the water pipes and the transmission lines aforesaid were in fact on the land and that the PUB and the LLN had legally installed them there in circumstances of which the vendors had actual knowledge. In a nutshell, the purchasers were alleging that the agreement was induced by fraudulent misrepresentation.

I The relief prayed for however was that the agreement should be rectified so that the total purchase price should read RM333,515 'to express the real intention of the parties' and that the court should decree specific performance of the contract rectified as prayed for. Damages were also prayed for. There was an alternative prayer reading as follows:

(iv) Alternatively, a declaration that the agreement dated 16 May 1988 may be rescinded and the defendant refund the deposit plus damages: ... . A

The amended statement of claim does not allege any special damage suffered by the purchasers. Nor does the body of the statement of claim allege that by reason of the vendors' conduct complained of, the purchasers suffered any damage, and if so what that damage was. The claim for B 'damages' thus stands alone and isolated in the prayer.

The entire evidence of the purchasers was directed to show that the vendors had fraudulently misrepresented the location of the water pipes and the transmission lines as being outside the boundary of the land. No evidence whatsoever was led to show that the purchasers had suffered any C actual damage either special or general and if so what the monetary value of that damage was. This was the position when the purchasers' counsel *closed* the purchasers' case on 29 March 1996.

Consequently, the vendors' evidence was also directed to rebutting the allegation of fraudulent misrepresentation and asserting that having D put the purchasers on written notice on 9 August 1988 that the vendors insisted on completion taking place on 16 August and that forfeiture would follow failure to complete, the vendors were entitled to act has they had done.

In his final submission in the court below, counsel for the purchasers E said nothing about any claim for damages. He confined himself to claiming that the agreement be rectified so that the area to be paid for should be 61.245 acres.

The rationale for the reduction was that the evidence suggested that the PUB had acquired the 4.08 acres comprised in their reserve from the F vendors' predecessors in title, Messrs Sin Hoa Realty Co Ltd, and had paid the purchase price through the collector of land revenue. Notwithstanding that there was nothing on the original or duplicate titles to show this acquisition, it was submitted that the PUB should be regarded as the legal owners of their reserve. We would prefer to express no opinion on this aspect of the matter. As for the LLN reserve, there was no G suggestion that title to the land comprised therein had passed to the LLN. This portion was 13.60 acres. In effect, therefore, the purchasers' contention in their final submission was that the contract should be rectified so that the area purchased should be 61.245 acres at RM7,000 per acre making RM428,715. H

These submissions were made in the face of an insurmountable obstacle. The register documents of title (each of which is indivisible in the absence of sub-division) was for 65.325 acres in total. Any conveyance of these 11 titles would have resulted in the purchasers becoming the registered proprietors of 65.325 acres of land as per the titles. The purchasers at the I end of the day, were asking the court to legitimize a transaction whereby they would pay for 61.245 acres but would acquire legal title to 65.325 acres as per the agreement.

A In a long and careful judgment, the learned judge found as a fact that the vendors had misrepresented the true location of the PUB and the LLN fixtures. He further found that this misrepresentation was made fraudulently in that its objective was to induce the purchasers to enter into the agreement on the basis that the fixtures were outside the land. On the available material, we are not disposed to disturb this finding.

B

However, in deciding what the proper remedy was, the trial judge's difficulties may well have been precipitated by the manner in which the case was presented and argued in the court below.

He declined to order rectification but instead ordered that the agreement be performed by the payment of the full balance of the purchase C price within one month from the date of the order. He further ordered the vendors to give the purchasers registrable transfers to all 11 titles within one month from the date of the order. And he ordered that damages be assessed on a date to be fixed by the deputy registrar. Upon completion of the transfers, he suggested that the purchasers could take up matters with D the relevant land authorities to make the relevant entries on the titles to reflect the existence of the PUB and LLN reserves.

These orders are not precisely worded but in effect the learned trial judge ordered specific performance of the agreement in spite of the fact that the purchasers had elected to refuse to perform the agreement in E accordance with its terms. Furthermore by inference, the judge had literally rewritten the contract by overriding its specific term that time was of the essence. Damages were ordered to be assessed although no evidence had been led of any damages before the purchasers closed their case, and no issue as to damages had been raised in the purchasers' counsel's final submission. Neither the PUB nor the LLN were parties to the action and F their rights, if any, to be put on the title was not a matter to be taken for granted. The registered owners may well have been entitled to resist such a move, inter alia, because of the long delay and the court should not have pre-empted their rights.

The vendors appealed to us. There was no cross-appeal by the G purchasers. So they have elected to have the High Court order left as it is.

After raising the question as to the circumstances in which a court can order rectification of a contract, the learned trial judge set out ss 30 and 32 of the Specific Relief Act 1950. He then went to analyse the evidence, rule out the need to entertain any suggestion of mutual mistake H but found that the contract was induced by fraudulent misrepresentation. Unfortunately, he did not then go on to consider whether rectification could be ordered. All he said after ordering specific performance of the agreement was:

> I do not think under the circumstances that I should order rectification of the agreement.

I

With respect, it would be erroneous to suppose that, in the circumstances of this case, s 30 of the Specific Relief Act 1950 had any application. A contract may only be rectified to express the intention of *both* parties to

the agreement. Illustration (a) to s 30 sets out the appropriate parallel. Here, the contract was for the transfer of the 11 titles containing 65.325 acres. Both parties intended to buy the land. The purchasers' claim for rectification was that they should only buy and/or pay for 47.645 acres. In other words, 17.68 acres should be taken out of the agreement. However, the vendors never intended to sell only 47.645 acres. Nor for that matter did the purchasers intend originally to buy 47.645 acres. The fraud in this case did not relate to the identity of the subject matter of the contract, but only to a part of its character. The reliance on s 30 of the Specific Relief Act 1950 was therefore wholly misplaced. Unfortunately, neither counsel nor indeed the trial judge went into the real significance of the passage cited from Chesire, Fifoot and Furmston's *Law of Contract* at p 430. We will repeat it here with the necessary emphasis:

> It is a fundamental principle that the effect of a misrepresentation is to make the contract voidable and not void. This means that the contract is valid unless and until it is set aside by the representee. *On discovering the misrepresentation, the representee may elect to affirm or rescind the contract.* (Emphasis added.)

It is elementary law that a party to a contract, who alleges fraud, cannot avoid one part of the contract and affirm another, unless the parts are so severable as to be independent contracts. This proposition can be found in Kerr on *Fraud and Mistake* (7th Ed) pp 515 and 517 where the cases are set out. See also *Vendor and Purchaser* by RM Stoneham (1994) at p 815. The same proposition is repeated on *The Indian Contract and Specific Relief Acts* (9th Ed) by Pollock and Mulla at p 458 which reads:

> ... a man cannot rescind a contract in part only, when he decides to repudiate it, he must repudiate it altogether.

Having been put on notice on 9 August 1988 in no uncertain terms, the only option the purchasers had was either to perform the agreement according to its terms, or repudiate it altogether and sue for damages for fraud.

The purchasers' attempt in October 1988 to revive the agreement by tendering the full purchase price in return for transfer was a vain attempt to turn the clock back. We have noted that this tender was unqualified, and had it been so made on 16 August 1988, it may well have resulted in a waiver of the claim for damages. However, the respective rights and liabilities of the parties in the circumstances of this case must be determined by what happened on completion day.

The purchasers' refusal on that day to perform the contract in part, was effectively a partial rescission of the contract by taking out *17.68* acres. The subsequent concession in the purchasers' closing submission to taking out only *4.08* acres sought to perpetuate the fallacy that the purchasers were legally entitled to a partial rescission of an indivisible contract. What it totally overlooked was that if the contract was to be performed at all, it must result in the transfer of the whole of the *65.325* acres.

A In this context, the relevant part of the judgment in the court below reads:

> It would seem that failure to observe time fixed by the contract for completion will be looked at upon a different light in equity if to do so would cause injustice, ie the time fixed by the parties for completion will not be observed
B if to do so would cause injustice. *The evidence in the instant case shows that the plaintiffs have decided to affirm the agreement when they decided to complete the purchase of the land by proffering the full balance of the purchase price as agreed with full knowledge of the facts and misrepresentation.* The evidence show that they have paid a deposit of RM45,725.50 to the defendant which was subsequently forfeited by the latter and that they have incurred further
C expenses when they engaged the services of PW3 to survey the land. (Emphasis added.)

This is an error because far from affirming the contract on completion day, the purchasers repudiated it. The vendors' acceptance of this repudiation brought the contract to an end. The cheque for the reduced amount was
D returned the very next day and the deposit was forfeited. The purported affirmation in October 1988 could not revive the agreement.

Neither party cited *Stickney v Keeble* [1915] AC 386 in the court below. Indeed, it was never the purchasers' claim or submission that time should be extended because the agreement should be specifically performed in accordance with its terms. The trial judge's reliance on this case was,
E with respect, misplaced because in that case there was no express provision that time should be of the essence. Nor was that case an action for specific performance or rectification. It concerned a purchaser who was claiming for the return of his deposit where the vendor was guilty of unnecessary delay (see the headnote to the case). We think we should set out here the
F passages from the judgment of Lord Parker of Waddington which immediately follows the two paragraphs set out in the judgment of the trial judge, where Lord Parker said (see [1915] AC 386 at pp 415–416):

> This is really all that is meant by and involved in the maxim that *in equity the time fixed for completion* is not of the essence of the contract, but this
G maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, *the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential,* or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.
>
> H It should be observed, too, that it was only for the purposes of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who had put it out of his power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time. (Emphasis added.)

I What is said in this case about the vendor applies equally to the purchaser. In our case, the attempted partial rescission on completion day amounted to a total repudiation of the contract. It was therefore quite wrong to extend time and order specific performance.

Before us En Pathmanathan, counsel for the purchasers submitted that the purchasers' avoidance of that part of the contract which could not be performed was in accordance with s 56(1) of the Contracts Act 1950. He strenuously argued that the PUB reserve and the LLN reserve should be regarded as land to which the vendors could not make good title and should therefore be taken out of the contract. With respect, we think this attempt at partial rescission was misconceived. Section 56(1) reads:

> 56 (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, *the contract*, or so much of it as has not been performed, *becomes voidable* at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. (Emphasis added.)

The words, '... the contract, *or so much of it as has not been performed* ...' refers to the contract to transfer the whole of the 65.325 acres of the land. In the result, if the purchasers were purporting to act under this section, they had to avoid the whole of the contract. In the circumstances of this case, 'avoidance' is indistinguishable from 'repudiation' or 'rescission'.

The purchasers' counsel relied very heavily on *Topfell Ltd v Galley Properties Ltd* [1979] 2 All ER 388. This decision which is at best of persuasive value is readily distinguishable. A man bought a house in an auction for £3,850. In doing so, he relied on the auctioneer's representation that he would be given vacant possession of the ground floor. In fact, there was a statutory notice which the defendant knew about prohibiting occupation of the ground floor because the upstairs was already occupied. So he sued for specific performance with an abatement of the purchase price, and succeeded. This case was not cited in the court below. Whereas *Topfell Ltd* affirmed the entire contract and insisted it be performed, our purchasers repudiated the contract. Besides, there was no provision in that contract that time was to be of the essence.

The purchasers' counsel belatedly also handed us *Yap Hong Too & Anor v Wong Ah Mei & Anor* [1997] 1 MLJ 545. He must have thought it would support the action of the trial judge in overriding the 'time of the essence' clause. This case is also readily distinguishable both on the facts and the law. The vendors by their own default made it impossible for the purchasers to pay the full balance of the purchase price until the lapse of two days from completion day. There was no question of repudiation by the purchasers. The court was giving relief against forfeiture.

Very different principles of law are at work in our case. Had the trial judge been properly addressed on the law, he would not have ordered specific performance of the agreement because this remedy was no longer open to the purchasers and in any case there was no such relief requested in the pleadings. Consequently, the question of extending time for completion also did not arise.

Finally, there is the question of the deposit. The purchasers' repudiation was accepted by the vendors when they terminated the contract on 16 August 1988. This situation was brought about by the

misrepresentation of the vendors. For the vendors to retain the deposit in the face of the finding of fraud would be an unjust enrichment which we cannot permit. In accordance with the purchasers' alternative prayer, we therefore ordered it be refunded with interest at 8%pa from date of filing of writ on 28 December 1988 up to realization. We did not make any separate award for damages because none was pleaded or proven in the court below. Rescission and damages for deceit for fraudulent misrepresentation may be cumulative remedies but recovery under either head requires proper pleadings and proof. The purchasers' counsel closed his case without providing either and we do not think it right to reopen the issue of damages to be assessed as was done here.

The purchasers' caveats had to go. In allowing this appeal, we did not order costs because we disapproved the vendors' manner of inducing the purchasers to enter into this contract. If they were going to rely upon the rule of caveat emptor, they should have made that clear to the purchasers — as is where is — instead of making positive assertions which they ought to have known were false. However, we directed the security deposit for costs paid into court to be refunded to the vendors. We hope that the measure of interest we have ordered will go some way to assuaging any sense of grievance the purchasers may feel about how all this has ultimately turned out.

Appeal allowed.

Reported by Loo Lai Mee